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In The

Supreme Court of the United States

October Term, 1995

KATHY DOOLEY, Individually and as Administratrix of the Estate of Bruce Dooley, Deceased, and as Next Friend of Isaac Dooley and Dawn Dooley,

Petitioners,

v.

INTERNATIONAL SAFETY INSTRUMENTS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case is about the proper standard for federal courts to use in diversity cases when assessing the sufficiency of the evidence to create a genuine issue of material fact under Rule 56. A wrongful death case, the specific legal context raises the issue of assessing circumstantial evidence, and inferences legitimately drawn therefrom, under Mississippi products liability and warranty law.

1. Whether, under the command of the *Erie*[1] doctrine and *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*[2], in a products liability case based in substantive Mississippi law, federal courts must assess the sufficiency of the evidence using a standard accounting for Mississippi's substantive treatment of inferential evidence. The United States Court of Appeals for the Fifth Circuit has rejected not only incorporation of the relevant state substantive law, but also purports to apply a general federal standard, as announced in *Boeing Co. v. Shipman*[3], which rejects the standard announced by this Court in *Lavender v. Kurn*[4].

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[1] 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[2] 474 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

[3] 411 F.2d 365 (5th Cir. 1969) (*en banc*).

[4] 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946).

PARTIES

All parties to the proceedings before the Court of Appeals are stated in the caption. For convenience, Petitioners will be referred to collectively as "Mrs. Dooley" and the Respondent will be referred to as "ISI." Additional parties, who settled, were joined before the district court.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the case on summary judgment. *Kathy Dooley, et al., v. International Safety Instr., Inc.*, No. 95-60349 (5th Cir. Apr. 8, 1996) (*per curiam*, not published pursuant to Local Rule 47.5). The district court's opinion, granting a motion for summary judgment to International Safety Instruments, Inc., was handed down February 23, 1995, and filed the next day. *Kathy Dooley, et al., v. International Safety Instr., Inc., et al.*, No. 1:93cv562GR (S.D.Miss. February 24, 1995). The district court's opinion was not designated for publication.

Both opinions are reprinted in the Appendix.

JURISDICTION

A writ of certiorari is sought to review the Court of Appeals' decision, filed April 8, 1996, affirming the grant of a motion for summary judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Reproduced here are the relevant portions of Rule 56:

Rule 56. Summary Judgment

* * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or

without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

* * *

STATEMENT OF THE CASE

Because of the case's procedural posture, these facts will, as they must, be stated in the light most favorable to Mrs. Dooley. This case is about the thirty-foot plunge by Mr. Bruce Dooley from scaffolding at Chevron's Pascagoula, Mississippi, refinery. (R. 2-3) Jurisdiction in the District Court was predicated on diversity under 28 U.S.C. § 1332.

Most of the facts surrounding this terrible accident are not disputed. Mr. Dooley had seventeen years of experience working for Chevron, having joined the oil company in 1973 at El Segundo, California. He was also trained in the use of self-contained breathing apparatuses. (R. 185, 716) On April 19, 1991, Bruce was assigned to inspect a repair on a flare line. (R. 498) A flare line is a large pipe carrying gaseous by-products of petroleum distillation.

The repair, known as a "clamp," had been "repumped" with sealant the day before. (R. 34) The task required that Bruce climb up a "skinny" vertical ladder to a platform near the clamp. (R. 2-3, 1474) The flare line is about thirty feet above the ground. Once atop the scaffolding, Dooley was to use a device designed to detect hydrogen sulfide gas, known as a "sniffer," to test the repumped clamp for leaks. (R. 1474)

On their way to the flare line, Dooley and his "head operator," Mr. Jeff Scott, picked up an ELSA-5 respirator, manufactured by ISI, to protect against any potential leak of hydrogen sulfide gas. (R. 1474) Mr. Scott's job was part of a "buddy system," required by OSHA regulations. The

ELSA-5 apparatus consists of a bottle of compressed air, a gauge showing how much air remains, a valve at the top of the bottle requiring a quarter turn to start the air flowing, and a flexible hose running from the valve-gauge fitting at the bottle's neck to a clear plastic "bag" fitting entirely over the wearer's head. An elastic strip snugs the bag around the wearer's throat. Within the fitting where the hose joins the bottle is a "restrictor" device controlling the rate of flow from the bottle. The flexible hose carrying the air to the hood fits over the restrictor. (R. 206, 692, 735, 790, 791, 1158) The restrictor is visually akin to a "needle" used to put air in footballs; it releases air into the hose through a small aperture at the needle's tip.

Once at the site of the staging around the clamp, Jeff Scott saw Bruce turn on the ELSA's valve. Mr. Scott, standing next to Bruce, heard a hissing noise which he recognized indicated that air was flowing. (R. 503, 1474). Having donned the respirator, Bruce climbed the ladder to the platform. Mr. Scott did not see Dooley turn the respirator off at any time Dooley was climbing the ladder. (R. 1474) However, Dooley only remained on the platform for a few seconds. (R. 1475) He climbed back over the railing and descended a step or two. Jeff Scott saw that Dooley was shaky and in trouble. Dooley fell from the ladder head first, and died of a crushed skull. (R. 476, 480-81, 490-95) At the time of his death he was forty-two years old, lean, muscular, and in good health. (R. 477-80)

Jeff reported to a Chevron investigator on the day of the accident that he did not remember seeing Bruce struggle, twist, try to catch himself or brace for the impact. (R. 736) According to Chevron's investigation report citing

another eyewitness, Dooley did not grab for the ladder or flail as he fell. Apparently, Dooley was unconscious before he hit the ground. The coroner's report indicates this probability as well. (R. 491, 1551) The ELSA unit was later found turned off and the gauge on the bottle still registered full. (R. 1551) Jeff Scott stated he did not turn off the ELSA bottle, and could not remember whether air was flowing or not at the time he stripped the bag from Bruce's head. (R. 503, 1476)

Shortly after the accident, Chevron employees turned on the ELSA unit Bruce had worn and found positive air flow. (R. 1585, 1621) Chevron also had the air within the bottle tested and it was uncontaminated. At the time of the air testing, the bottle was about three quarter's full. (R. 1505) Chevron employees refilled the bottle, then on video tape tested the flow. (R. 1585)

The parties' experts agreed that Mr. Dooley's fall was consistent with hypoxia and hypercapnia (carbon dioxide poisoning). (R. 293, 304, 925) Mrs. Dooley's toxicologist, Dr. Arthur Hume, testified during his deposition that the eyewitnesses' description of Dooley as "shaky" would be consistent with hypoxia resulting either from carbon dioxide poisoning or exposure to hydrogen sulfide gas. (R. 925) ISI's respiratory protection specialist, Mr. Darell Bevis, opined in his report that a high concentration of carbon dioxide in the ELSA's hood likely caused or contributed to Dooley's fall. (R. 304). Also, Chevron's report states that "[o]ur tests show that if the ELSA plastic bag is worn over the head with the air valve closed, the oxygen percentage within the plastic bag drops rapidly."

Mrs. Dooley's expert mechanical engineer was Mr. G. Fred Liebkemann. Mr. Liebkemann has been qualified as an expert in mechanical engineering by numerous courts, including the District Court for the Southern District of Mississippi. (R. 1530) In his investigation report, he concluded that the ELSA unit was defective because the hose could be pulled at such an angle causing the hose to collapse against the air flow restrictor thus "crimping off" the air flow. Simple experiments conducted with Mrs. Dooley's trial counsel confirmed that the bottle can be worn so that the flexible hose bends ninety degrees blocking the tiny aperture at the tip of the restrictor needle. (R. 204, 206)

During his deposition, Mr. Liebkemann reviewed all of the circumstantial evidence. Based on the facts that Dooley had turned on the ELSA, that the device's gauge still read in the full range immediately after the accident, and that the ELSA was Dooley's only source of fresh air, he opined it was reasonable to conclude that something had restricted the flow to the transparent plastic hood. (R. 1614) He also stated that substantially less than one minute of air would have left the bottle for the gauge to remain in the full position. (R. 1615)

Reviewing the physical facts of the ELSA unit, Mr. Liebkemann observed that the devices develop a "natural" bend in the hose at the restrictor connection because of the product packaging: "[W]hen this thing was put into its pack and the hose is in this position and it stays this way in storage for months or years, the bend that's initially forced into the hose is going to become a permanent set in the hose, which is what we see here." (R. 1616)

Color copies of photographs show that the hose on Dooley's unit not only had this "permanent set" but that the hose's surface was also cracked and decayed from the passage of time. (R. 729, *passim*)

Mr. Liebkemann then stated that he believed that the design was defective because a life saving apparatus should not be capable of supplying persons with insufficient air simply because the hose collapsed over the air restrictor. (R. 1616) Mr. Liebkemann also related that ISI's competitors had been designing out such a potential hazard for years by using, for example, spring devices to prevent the hose from collapsing. The kinds of devices used to prevent flow from being cut off are a commonplace in industry. These alternative designs were available many years before the manufacture of the unit Dooley used. (R. 1616-17) As it turned out, ISI had begun installing just such an "anti-crimping" device in the ELSA units in January of 1987. Revealed during discovery, ISI issued a "Technical Bulletin" dated January 12, 1987, illustrating the new design. (R. 1158) The new design used a ferrule clamp to attach the hose to the restrictor. The metal ferrule extended over the restrictor far enough to prevent the flexible hose from collapsing against the restrictor's aperture. Logically, and as testified to by Mrs. Dooley's engineering expert, the only reason for the design change was to prevent the hose from crimping against the restrictor. (R. 1616)

Liebkemann thought it patently unreasonable to believe that an experienced worker like Dooley, who knew he was going into a potentially hazardous environment, would put a plastic bag over his head to climb roughly twenty-five feet with the air off. (R. 1619) Based

on all of the circumstantial evidence and eyewitness reports, Mr. Liebkemann was of the opinion that the defective hose-restrictor connection most likely caused Mr. Dooley's anoxic condition and the fall leading to his death. (R. 1620)

REASONS FOR GRANTING WRIT

The question is whether, in a diversity case turning on circumstantial evidence and reasonable inferences therefrom, the relevant *state* substantive law for judging the sufficiency of circumstantial evidence should be incorporated within the familiar, Federal Rules-based, process. This case was adjudicated under Rule 56, but similar sufficiency determinations are required under Rule 50. As can, and will, be readily demonstrated, the Supreme Court of Mississippi has never countenanced the grant of a motion for summary judgment in cases with evidentiary postures similar to this one.

The policies enunciated in *Erie* are implicated. Consequently, a vitally important question, especially in cases where circumstantial evidence forms the basis of proof, has arisen in this case requiring the Court to step in to assure the uniformity of the principles undergirding sufficiency determinations. Since Rule 50 and Rule 56 motions are raised in a large number of cases before federal courts, this is a constantly recurring problem, implicating the proper functioning of the entire federal judiciary.

The import of the Court of Appeals' decision is not confined to this case or even Rule 56. The Fifth Circuit, as

have other Courts of Appeals, has used various formulations over the years. The Courts of Appeals are divided on how evidentiary sufficiency should be determined[5]. At least in cases where the substantive law is bound up with derterming what inferences are legitimate, this Court has said that the substantive law must be looked to for sufficiency determinations. In light of the Court's famous trio of Rule 56 cases from 1986, this issue, which first came to the Court's attention in 1940 but has never been decided, is ripe for resolution.

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[5] The Courts of Appeals remain divided on the issue of what standard should govern evidentiary sufficiency. See generally, 9A Wright & Miller, *Federal Practice and Procedure*, §§ 2525, 2527 (1995). The Seventh Circuit recently reviewed its thirty years of vacillation and determined that a federal standard should apply, *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994). The *Mayer* case also contains a current "circuit count" showing that all but the Sixth Circuit have switched to a federal standard. That this result is not necessarily consistent with *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), is the basis of this Petition.

I. *ERIE* MANDATES THE APPLICATION OF MISSISSIPPI SUBSTANTIVE LAW TO CASES WHERE THE SUBSTANTIVE LAW GOVERNS THE SUBMISSION TO THE JURY OF CIRCUMSTANTIAL EVIDENCE AND THE INFERENCES WHICH MAY BE DRAWN, AS A MATTER OF LAW, FROM THE SURROUNDING CIRCUMSTANCES.

Rule 56 and its trial-time compatriot, Rule 50, provide, by definition, the procedure through which a court must determine whether a party is entitled to judgment as a matter of law. Rule 56 includes no language suggesting what quantum or nature of evidence is sufficient to require a decision by a fact-finder.

Because the line between substance and procedure, as the Court recognized in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), incorrigibly shifts as the legal context shifts, the Court has developed a multi-step analysis:

> 1) "[t]he first question (is) whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court," *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50, 100 S.Ct. 1979, 1985, 64 L.Ed.2d 659 (1980);
>
> 2) if so, then the court must determine whether the rule is a valid exercise of power granted by the Rules Enabling Act and the Constitution, *Hanna*, 380 U.S. at 471, 85 S.Ct. at 1144; and
>
> 3) if there is no "direct collision" between a federal rule and state rule, then the court must decide whether a "federal judge-made law would disserve the so-called 'twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of

> the laws.' " *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27, fn. 8, 108 S.Ct. 2239, 2243, fn. 8, 101 L.Ed.2d 22 (1988), *quoting Hanna*, 380 U.S. at 468, 85 S.Ct. at 1142.

A dry exegesis of these points must await the luxury of a brief on the merits. For the moment, we may observe that our paper is not blank with respect to whether there is a "direct collision" between a federal and state standard. If one assumes the Fifth Circuit is correct, then, as will be shown *infra*, there is a demonstrable direct collision between the result here in a federal court and results reached by the Supreme Court of Mississippi. On the other hand, if the teaching of *Matsushita* is correct, that in at least some cases substantive law will govern evidentiary sufficiency, then what must be shown is whether Mississippi's law of products liability, like antitrust law, is appropriately used to determine whether evidence raises a jury question.

On one hand, there is a direct collision; on the other, Rule 56 is not sufficiently broad to cover the disputed issue. These points, though related, will be explored sequentially.

A. The direct collision between the *Shipman* standard and Mississippi's standard depends on viewing the sufficiency standard as an incident to Rule 56.

The United States Court of Appeals for the Fifth Circuit has long employed what that court denominates as a "federal standard" testing the sufficiency of evidence. In *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380

F.2d 869 (5th Cir.), *cert. den.* 389 U.S. 930 (1967), the court concluded that *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), required a federal sufficiency standard. Two years later, the court, sitting *en banc*, confined *Planters* and the *Lavender* standard to FELA cases. *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969). Here is the language from *Lavender* which *Shipman* rejected for diversity cases:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

Lavender v. Kurn, 327 U.S. at 653, 66 S.Ct. at 744.

The *Shipman* Court announced a reasonable-person "substantial evidence" test for sufficiency questions:

> consider(ing) all of the evidence . . . in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting (judgment as a matter of law) is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise

> of impartial judgment might reach different conclusions, (judgment) should be denied, and the case submitted to the jury.

Shipman, 411 F.2d at 374.

Just how "a complete absence of *probative* facts" (emphasis supplied) differs from the *Shipman* standard has never been explained. The *Shipman* Court was semaphoring that the "measure of speculation and conjecture" to be permitted the jury was a lesser measure than indicated by the results of *Lavender* and *Planters*.

These semaphore wavings, as applied by the district court and Fifth Circuit, led in this case to a result utterly at odds with Mississippi law. If one views the *Shipman* standard as a necessary part of the process prescribed by Rule 56, then there is a "direct collision" between the federal rule and Mississippi's rule. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749, 100 S.Ct. 1979, 1985, 64 L.Ed.2d 659 (1980).

Mississippi strict products liability law requires that "only in rare and exceptional cases . . . (which depend) on circumstantial evidence should (the case) be taken from the jury." *BFGoodrich, Inc. v. Taylor*, 509 So.2d 895, 904 (Miss. 1987). The range of permissible inferences in Mississippi strict products liability law encompasses inferences analogous to *res ipsa loquitur*. In cases where the proof of the defect is circumstantial, the "custody and control" requirement of *res ipsa* is substituted with a "but for" analysis: but for a defect which probably was caused by the manufacturer either through the manufacturing or design process – that is, where the evidence tends to eliminate other causes for the defective condition – no

incident would have occurred. Like *res ipsa loquitur*, such a showing shifts the burden of production to the defendant. *Coca Cola Bottling Co., Inc. v. Reeves*, 486 So.2d 374 (Miss. 1986); *Fruehauf Corp. v. Trustees of First United Meth. Church*, 387 So.2d 106 (Miss. 1980); *generally*, Rheingold, *Proof of Defect in Product Liability Cases*, 38 Tenn.L.Rev. 325, 326, n. 5 (1971).

The most recent word from the Supreme Court of Mississippi dealing with circumstantial evidence in products liability cases is *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993). An "exploding battery" case, the Supreme Court of Mississippi reversed a grant of summary judgment. Daniels purchased a battery from the defendants and used it in his truck. The battery apparently worked well for two months. One morning, when the truck would not crank, Daniels lifted the hood. A trained and experienced mechanic, Daniels apparently believed the battery had either discharged or had a loose connection. He touched the cable and at that moment the battery exploded blinding him in his left eye. *Daniels*, 629 So.2d at 597.

The dealer from whom he purchased the battery, after being shown its remains, told Daniels that "there was nothing he could do about the situation." *Id.* Thereafter Daniels stored the battery in various locations and finally disposed of it. GNB's expert opined that batteries manufactured by GNB would not explode unless misused, abused, or neglected. Daniels' expert believed that batteries could explode from internal failure and not merely intentional or negligent misuse. Daniels' expert reviewed the circumstances alleged by Daniels, principally that, as a trained mechanic, Daniels could tell the

battery was new. The expert said that it was likely the battery was defective because of an internal defect generating too high an internal pressure. *Id.* at 598-99.

In discussing the wholly circumstantial evidence regarding the battery's defect, the *Daniels* Court quoted *Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves*, 486 So.2d 374, 383 (Miss. 1986):

> 'This circumstantial evidence – of lack of abuse or misuse, of lack of anything other than normal use, of lack of opportunity for any use or handling at all – is sufficient to allow a reasonable juror to conclude that it was more probable than not that the carton immediately prior to the accident was in substantially the same condition as when it left the hands of Vicksburg Coke. There being . . . substantial credible evidence that at the time of the accident the carton was defective, we hold, faithful to *Paymaster Oil* [319 So.2d 652] [(Miss. 1975)] that the evidence is sufficient for plaintiff's purposes to establish that the defective condition existed at the time the carton left the hands of Vicksburg Coke.
>
> We recognize that much of what we have said above turns on circumstantial evidence and probabilities drawn therefrom. The probability of the correspondence of the conclusions reached to actual fact has been rendered far more likely by the absence of any credible evidence supporting Vicksburg Coke's view on any of these critical fact issues.'

This is Mississippi's clearest expression of the products liability *res ipsa* analog. Indeed, three members of the Supreme Court of Mississippi believed the analysis too much like *res ipsa loquitur* and dissented. *Reeves*, 486 So.2d

at 388-91 (per Walker, P.J., Hawkins, J., Roy Noble Lee, P.J.) The facts of this case are similar to those of *Daniels* and demonstrate clearly that had this case been litigated in a Mississippi court, it would have reached trial.

During his deposition, Liebkemann reviewed the basic physical facts: Dooley was a veteran refinery worker, familiar with turning valves of all kinds, and trained in the use of self-contained breathing apparatus. Dooley put the ELSA on, turned the valve, air started flowing, he then climbed a ladder to a platform where he remained a matter of seconds. Returning prematurely to the ladder, he climbed down a step or two while obviously impaired, and then simply let go. As he fell, he did not struggle or flail. He landed on his head. A Chevron videotape shows that the gauge's indicator needle was in the green, full area on the round gauge. The other experts concluded that Dooley's limp fall indicated he had become unconscious from lack of air. The ELSA was Dooley's only source of air. Given these facts, and his review of the ELSA device as a mechanical engineering expert, Liebkemann concluded that something had to have restricted the flow. (R. 1618)

Liebkemann believed that the most likely cause of the restriction was a design failure: instead of protecting the passageway, the flexible hose bent up against the restrictor needle cutting off the flow. There are no Mississippi cases where such evidence has not made out a *prima facie* case. See, *e.g.*, *Daniels*, 629 So.2d at 602-03; *Tolliver v. General Motors Corp.*, 482 So.2d 213, 218 (Miss. 1986); *Dunson v. S. A. Allen, Inc.*, 355 So.2d 77, 78-79 (Miss. 1978).

There is no evidence from ISI indicating that these inferences are not legitimate and for the jury to assess. As *Reeves* and *Daniels* contemplate, the burden of production shifts to ISI to show facts which explain the accident in such a way to relieve itself from liability. With respect to the ELSA design, ISI itself changed the restrictor-hose connection design in 1987. Mr. Darell Bevis, ISI's respiratory protection specialist, reported that when the ELSA is "properly worn" it is impossible to crimp the hose against the restrictor. Bevis cited no facts supporting his wholly conclusory opinion. Bevis did not describe what the "proper" mode of wearing the device is, nor why the device only should be worn so. (R. 302-03)

Bevis concluded that most likely Dooley failed to turn the ELSA on. As a result, he opined, carbon dioxide built up under the transparent hood quickly causing Dooley to become groggy and possibly causing him to become unconscious as he fell. As far as the parties' experts and other evidence goes, Dooley's climb, brief stay on the platform, obvious grogginess before he fell, his motionlessness as he fell, all point to asphyxiation.

Mr. Bruce Hefner, ISI's employee, stated that with units like the one Dooley used he was unable to get the hose to crimp without "deliberate abuse." Hefner does not describe in his report what "deliberate abuse" he had in mind, nor how he attempted to "re-enact" Mrs. Dooley's theory of the case. (R. 313) Assuming that Hefner was unable to cut off the flow without forcing the hose to bend at a ninety degree angle, this seems entirely consistent with Mrs. Dooley's theory of the case. The hose on the unit Dooley wore had acquired a permanent bend;

photographs show that the rubber was decayed and cracked at the joinder with the restrictor needle.

Mississippi's preference for leaving inferential decisions in the hands of juries represents more than merely a policy of respecting juries as representatives of the body politic. A jury's wisdom can be as perverted as anyone else's. Mississippi's choice for leaving inferences to juries represents the state's decision that within a body of law whose purpose is to maintain the integrity of the person, an erroneous decision is equally costly to society whether the error is a denial of recovery or a verdict for the plaintiff.

Certainly, it would be difficult to argue that *res ipsa loquitur* is not interwoven with basic negligence rules. While not a diversity case, the Court appears to have viewed *res ipsa* as "substantive" in *Jesionowski v. Boston & M. R. R.*, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416 (1947). More *apropos*, the Court discussed the policies underlying burden shifting in *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). That case dealt with whether California could attempt to regulate speech through the device of its tax code. That code placed the burden of persuasion on the taxpayer to establish his or her inoffensiveness to the continued vitality of the state and federal governments.

Burdens of production and persuasion are used to take account of the risks of erroneous fact-finding. For example, as in *Speiser*, where First Amendment rights are implicated the risk of incorrect fact-finding creates a danger that protected speech might be unconstitutionally suppressed. "The man who knows that he must bring

forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Speiser*, 357 U.S. at 526, 78 S.Ct. at 1342. The burden of persuasion was entwined with the rules governing primary behavior.

In this case, because the burden of persuasion is a preponderance, Mississippi views the risk of mistaken fact-finding as roughly equal. Therefore, Mississippi may legitimately require a defendant to come forward with an explanation relieving the defendant of liability where a plaintiff has shown facts tending to negative the happening of the untoward events without fault by the defendant. As in *Speiser*, a manufacturer which knows it may be required in court to produce facts demonstrating the safety of its products will produce safer products. And among the policies underlying modern strict products liability law is the making of safer products. See, *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1962).

As a result of this "direct collision" between the Fifth Circuit's standard and Mississippi's standard, the analysis moves on, but briefly, to whether the federal judge-made law exceeds the Rules Enabling Act. There is no clearer example of a case where the federal rule necessarily "abridge(s) . . . or modif(ies) (a) substantive right" than where the application of a standard of sufficiency of evidence would terminate litigation in federal court but result in a trial in state court. The standard applied in this case violates the Rules Enabling Act, 28 U.S.C. § 2072. Also, a different result reached in a court purporting to sit as another court of the state implicates the "twin aims" of *Erie*.

A reverse forum-shopping by defendants will be prompted by this case. More importantly, application of the Fifth Circuit's standard in this case unfairly discriminates against citizens of Mississippi. The inequitable administration of the law as between the federal courthouse and the state courthouse is, of course, repugnant to the principles of federalism inherent in *Erie*'s "twin aims." The "etiquette" of federalism, suggests the importance of the issue, if not its resolution.

B. Where Mississippi substantive law governs what inferences may be drawn from circumstantial evidence, the substantive law necessarily determines whether evidence is sufficient to submit the case to the jury and Rule 56 merely creates the process by which that assessment is made.

Dissenting in the *Shipman* case, Judge Rives believed that the Fifth Circuit had committed an error of constitutional proportions in overruling *Lavender* but that the problem of what standard should be used to test sufficiency of evidence was raised so regularly "that a petition for certiorari in some case can hardly be far distant." *Shipman*, 411 F.2d at 378, fn. 2.

Relevant to the importance of the question here, Judge Rives said that

> [i]t goes without saying that the *result* of the application of (the *Lavender*) standard varies according to the substantive elements of the claim. For example, it is rare that a trespasser can produce evidence warranting submission of his case to a jury, and, at the other extreme, it is

> rare that an employee in an FELA action fails to produce such evidence. The reason lies not in any difference in the standard of sufficiency of the evidence to preserve the right of trial by jury but in the vast differences between the substantive elements of the torts.

Shipman, 411 F.2d at 380. Judge Rives believed that the substantive FELA law permits the case to go to the jury upon a showing of "slight" negligence on the part of the employer. In contradistinction, premises liability in a trespasser case requires proof of willful disregard. Is Judge Rives' analysis correct? Is conceiving the issue as an "either/or" unitary choice between a "federal" rule as opposed to a "state" rule looking at the problem from an angle below the surface of the sand?

Judge Rives believed that searching for a uniform statement of a standard governing whether sufficient evidence was presented for a jury decision was both unnecessary and ultimately futile, *Shipman*, 411 F.2d at 392-94. As for diversity cases, the thrust of Rives' analysis is that different courts' uses of varying language is not so germane to deciding whether a case goes to the jury as what policies the substantive law suggest in determining whether a judge or a jury should decide a case. In Judge Rives' view, this is nothing more than the familiar "feedback" loop between substantive law and procedural law. And is this the real meaning of *Matsushita*?

One looks to Rule 56 in vain for help with this issue. The following has become rote: A moving party who will not bear the ultimate burden of persuasion at trial on an issue bears a burden of production to illustrate to the court that no genuine issue of material fact exists. If this

burden is met, the non-moving party must point to some evidence that conflicting material facts exist which might affect the determination of issues under the substantive law. With respect to the motion for summary judgment, the ultimate burden of persuasion rests with the moving party. The court reviews the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in the non-moving party's favor. The court may not invade the province of the jury by weighing the evidence or examining the credibility of witnesses. For all of which see, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

None of this reaches the question raised in this case: what nature and quantum of evidence is required to create a genuine issue of material fact for a jury's resolution. In *Matsushita*, the Court said that whether summary judgment is appropriate or not in a complex antitrust case requires the court to first examine, under the substantive law, the economic plausibility of the plaintiff's claim. The plaintiff must show, where the evidence is circumstantial, that an inference of conspiracy is reasonable in light of competing inferences. In the factual context of antitrust claims alleging an agreement to fix prices or commit other antitrust violations, "[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff . . . must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), *quoting Monsanto Co. v. Spray-Rite Service Corp.*,

465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L.Ed.2d 775 (1984).

Antitrust law limits the range of inferences permissible to a jury because of the policies undergirding that body of law. In *Matsushita* the plaintiffs claimed that the alleged supracompetitive pricing in Japan had two salutary results: monopolistic profits and excess capacity because of the limited demand in Japan occasioned by the supracompetitive pricing. The excess, plaintiffs claimed, was "dumped" below cost in the United States market in order to drive other manufacturers from the market.

The problem for the plaintiffs was not that there was no evidence supporting their theory, but that the Japanese manufacturers had no motive to sustain the "investment" in the United States market without some likelihood of the alleged conspiracy's success. A conspiracy inference from circumstantial evidence was circumscribed because the conspiracy was theoretically implausible. The policy rationale was that without such a limitation on conspiracy inferences, the danger of deterring procompetitive conduct would be too great.

Matsushita, then, acknowledges that a standard employed pursuant to Rule 56 must, at least in some cases, take into account the policies of the substantive law. In the language of the *Hanna* analysis, Rule 56 simply does not "cover the field." Of course, *Matsushita* involved federal law. But the question remains, may not other bodies of substantive law, because of their underlying policies, also affect permissible inferences? If it is

acknowledged that inferences necessarily affect the sufficiency of the evidence, what are the implications for diversity cases?

Other than the logical implications from *Matsushita*, guidance from the Court is elusive. Judicial attention to whether a state or federal standard should be used to determine the sufficiency of the evidence began, not surprisingly, shortly after *Erie* was decided. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336, 85 L.Ed. 284 (1940). *Stoner* failed to resolve the issue.

Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), dealt with the question of whether a state rule requiring that a judge determine a question of fact should affect the traditional distribution of functions between the judge and jury in federal court. *Byrd* did not address sufficiency of the evidence determinations but rather whether a rule which "displaces the jury without regard to the sufficiency of the evidence to support a jury finding . . . " should be applied in federal court. *Byrd*, 356 U.S. at 540, n. 15. The *Byrd* Court found the South Carolina rule not the kind of rule forming an "integral part of the special relationship created by the statute . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Byrd*, 356 U.S. at 536, 78 S.Ct. at 900. *Byrd*'s logical implication is that a different answer might prevail in a case where the rule is bound up with primary conduct.

Two other cases have come before the Supreme Court raising the issue of whether the sufficiency standard is governed by state or federal law but they have been turned aside for procedural reasons; *Dick v. New York Life*

Ins. Co., 359 U.S. 437, 79 S.Ct. 921 (1959); *Mercer v. Theriot*, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964).

The teachings of *Matsushita* and *Byrd* suggest that "state rules," to be accorded enforcement under *Erie*, must be closely bound up with a state's rules determining rights and obligations. Where the substantive law controls the range of permissible evidentiary inferences, the rules stating the permissible inferences are necessarily "bound up with rights and obligations."[6] That Mississippi's policies in products liability cases are bound up with the rules creating liability, and therefore governing primary conduct, has been sufficiently discussed *supra*.

Consequently, the Court may conclude that Rule 56 does not apply to sufficiency determinations. We reach the final analysis: will a federal judge-made rule "disserve the so-called 'twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.' " Declining to use the Mississippi standard, or use Judge Rives' analysis to impart the substantive lessons within the federal judge-made rule, leads to the same result whether one views

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[6] The Mississippi products liability circumstantial evidence rule has the effect of a substantive rule shifting the burden of production. This function is similar to a state rule which places, for example, the burden of production on one who claims title to real property through equity to show that a bona fide purchaser for value did not, in fact, purchase for value or purchase innocent of the superior equitable title. *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939). Should the Court view this case under its bright-line characterization of such rules as substantive and enforceable under *Erie*, this case may be much ado about very little.

this case under "step 2" or "step 3" of the *Stewart Organization-Hanna* analysis. Preventing inequitable administration of the law between coordinate courthouses is most powerfully implicated.

C. The Fifth Circuit, having had its restrictive view of expert evidence overruled by this Court, now seeks the same result by means of permitting the district court to assess the credibility of a witness and the weight to be accorded the testimony.

It is excellent
To have a giant's strength, but it is tyrannous
To use it like a giant!

* * *

Because Authority, though it err like others,
Hath yet a kind of medicine in itself,
That skins the vice o'th' top.

Measure for Measure, Act II, Scene 2

Even a cursory review of the evidence in this case shows a classic "battle of the experts" over circumstantial evidence. The result reached by the court of appeals is nose-wrinkling. The inescapable conclusion is that the result in this case is about the political unacceptability of Mississippi products liability law. The Fifth Circuit earlier had attempted to limit another politically unacceptable class of cases, toxic torts, through the device of modifying the Federal Rules of Evidence. *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. den.*, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992) (White and Blackmun, JJ, dissenting). Of course, four votes for

granting a writ of certiorari were soon mustered and the Court overruled the Fifth Circuit in *Daubert v. Merrell Dow Pharm., Inc.*, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Judge Carolyn Dineen King's dissent to the *Christophersen per curiam* eloquently states the argument against a federal court's arrogating to itself the power to determine that some bodies of law should be limited:

> Lest anyone misunderstand, at root this is not a case about the (federal rules). . . . It is instead about the outcomes in toxic tort cases. What the majority is saying is that in its view, the outcomes in toxic tort cases that have been left to the jury have too often been unacceptable.
>
> . . .
>
> Before today's decision, I should have thought that a dispute among qualified experts would preclude, not mandate, summary judgment.
>
> The majority, so willing to decry judicial activism in other contexts such as prison overcrowding or supervision over schools, engages in the worst sort of judicial legislation. . . . Such cases . . . may involve scientific disputes which the courts are sometimes ill-suited to resolve, and may cause severe and perhaps unwise economic disruptions. . . . If a federal substantive rule needs to be devised to supplant state law criteria for recovery, then Congress is the proper branch to devise it.
>
> But at least until now, the decisions when and under what circumstances corporate America or its insurers pay in the area of toxic torts have not been vested by the Constitution or the Supreme Court in federal judges. Those decisions have been determined by state law, as

> applied by juries. Today's decision places a far greater hurdle in the path of . . . plaintiffs in federal court than such plaintiffs face in a state forum. This lack of congruence with the state courts in cases dependent on our diversity jurisdiction is fundamentally at odds with the Supreme Court's decision in *Erie*. As a result, we encourage reverse forum shopping and deprive plaintiffs of the substantive rights that should be available to them under state law.
>
> The majority, in its haste to achieve more acceptable results, tramples on fundamental Constitutional principles that one might have expected this court, above all others, to hold dear – the separation of powers between Congress and the federal courts, the right to a jury trial and the role of the states in our federal system. . . . Such result-oriented decision-making can only erode respect for the federal judiciary.

Id. at 1136-38.

It is a hard thing for a lawyer to take to task a distinguished panel of a distinguished court. This writer, being no braver than needs be, thus quotes Shakespeare and Judge King. The task is a hard one because the lawyer necessarily charges the judiciary with a violation of its oath[7]. Blackstone could say, without apparent irony,

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[7] It is, of course, not only possible but unavoidable in this world to be able to decry a person's – or court's – misstep while maintaining affection and respect notwithstanding. I would offer the example of two of the most talented judges ever to grace a court of appeals: Learned Hand and Charles Clark. In the thirties, these Second Circuit judges were convinced that the

that the judiciary were "the living oracles" of the common law. Today the same effect seems unlikely. This writer, armed with Article III of the Constitution, and with his own oath – and with continuing respect for Judges Duhe, Barksdale, and DeMoss – is propelled onto this field.

No one doubts that *Erie* meant, without authorization from Congress, Article III grants no power to the federal judiciary to make law for the states. That the federal government is one of express and limited powers, and that the federal judiciary are courts of limited jurisdiction, are commonplaces. While a federal court has the power to displace state law, because cases must be decided, without more, it has no right or authority to do so.

The choice before the Court is stark: whether it will accede to the *ultra vires* act of the Fifth Circuit, or whether it will grant the writ to inquire into the erosion of federalism immanent in this case.

Court's decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918), used such open-ended language that a court could find intellectual property rights under the common law to the detriment of legitimate competition. In a memorandum to other members of a panel, Judge Clark wrote, "[i]n principle, this case is entirely indistinguishable from *International News Service v. A.P.* . . . and we might as well admit it. But we have conquered the News case before; it can be done again." Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U.Chi.L.Rev. 411, 419 (1983), quoting from Judge Clark's memorandum to Learned Hand and Robert Patterson, contained in Judge Hand's papers at the Harvard University Law School Library.

IV. CONCLUSION

Without further guidance from the Court, a sufficiency standard to create a genuine issue of material fact may be seen as necessarily part of Rule 56. Or the sufficiency standard may be conceived as outside the scope of Rule 56. The issue raised under either analysis is of obvious importance to the operation of the federal courts and the avoidance of the federal court's intrusion into state sovereignty.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-60349

KATHY DOOLEY, Individually and as Administratrix of the Estate of Bruce A. Dooley, and as Next Friend of Issac Dooley and Dawn Dooley,

Plaintiff-Appellant,

VERSUS

INTERNATIONAL SAFETY INSTRUMENTS, INC.

Defendant-Appellee,

and

TEAM ENVIRONMENTAL SERVICES; ABC CORPORATION, BRAND SCAFFOLD SERVICES, INC.; SCAFFOLDING RENTAL AND ERECTION SERVICES, INC., also known as Brand Scaffold Services, Inc.,

Defendants.

Appeal from the United States District Court
For the Southern District of Mississippi

(1:93-CV-562-GR)

(Filed Apr. 8, 1996)

Before DUHÉ, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:[1]

Bruce Dooley was killed while performing his work at Chevron's Biloxi, Mississippi refinery and his widow and children brought this action claiming defective design against the manufacturer of the safety breathing equipment he was using. The district court granted summary judgment for defendant and plaintiffs appeal. We affirm.

Plaintiffs contend the district court erred by weighing the credibility of plaintiff's expert witness and in granting summary judgment for defendant. We have carefully considered the parties' briefs, their oral argument, and have studied the record; in particular, the district court's reasons for its ruling. We are convinced that the district court did not weigh the credibility of plaintiff's expert nor did the district court rule that evidence inadmissible. Careful reading of the district court's pronouncements shows that, considering the expert evidence, the district court found that plaintiffs have not shown an issue of material fact as to defect in the design of the safety equipment or any causal connection between its design and the tragic death of Mr. Dooley. We see no error in this ruling.

AFFIRMED.

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[1] Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

KATHY DOOLEY, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. 1:93cv562GR

INTERNATIONAL SAFETY
INSTRUMENTS, INC., ET AL. DEFENDANTS

MEMORANDUM OPINION

(Filed Feb. 24, 1995)

This cause comes before the Court on the motion of defendant, International Safety Instruments [ISI], for summary judgment against plaintiffs. After due consideration of the evidence of record, the briefs of counsel, the applicable law and otherwise being fully advised in the premises, the Court finds as follows.

Standard of Review

In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in the light most favorable to the nonmoving party. *McPherson v. Rankin,* 736 F.2d 175, 178 (5th Cir. 1984). The Supreme Court has discussed and clarified the relevant standard for summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

> In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Furthermore, speculative evidence, lacking a reasonable basis in fact, is insufficient to enable the nonmoving party to avoid summary judgment. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Although Rule 56 is peculiarly adapted to the disposition of legal questions, it is not limited to that role. *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986). Hence, "[t]he mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material." *Id.* Defining these terms, the Fifth Circuit has stated:

> An issue is genuine if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of that party. If, on the other hand, the evidence offered by both the moving and opposing parties would support only one conclusion and, even if all the evidence to the contrary is fully credited, a trial court would be obliged to

> direct a verdict in favor of the moving party, the issue is not genuine.
>
> * * *
>
> Thus, as the Supreme Court recently said in *Anderson v. Liberty Lobby, Inc.*, affirming a summary judgment rendered by a trial court: "The inquiry performed is the threshold inquiry of determining whether there is a need for trial – whether, in other words, there are any genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."

Id. at 223.

"With regard to 'materiality,' only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment." *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir. 1987), *cert. denied* 484 U.S. 851 (1987). Applying the summary judgment standard to the evidence presented by the parties to this motion, the Court makes the following findings.

Statement of Facts

On April 19, 1991, Bruce Dooley was fatally injured when he fell from a ladder after testing a flare line for leaks at Chevron USA, Inc.'s [Chevron] refinery at Pascagoula, Mississippi. Dooley was entering an area which could have contained hazardous gases. At the time of the incident, Dooley was wearing a life support apparatus, an ELSA-5 [ELSA] manufactured by ISI. The ELSA contained five minutes of air and was intended for emergency escape use only. Immediately after the fall, the air valve

of the ELSA was found in the "off" position and the gauge on the air supply bottle indicated it was full of air. (Pls.' Supp. Resp., Exh. 2, Subexh. 2, Depo. Summ. of Donald Pratt.) Post-accident testing of the ELSA found the unit to be functioning properly.

Jeff Scott, Dooley's co-worker, testified by affidavit that he saw Dooley turn the ELSA unit on and test the unit before Dooley went up the ladder. (Pls.' Supp. Resp., Summ. J. Mot., Scott aff., Exh. 2.) Scott stated he did not know if Dooley left the unit on after this. *Id.* Scott indicated that Dooley went up the ladder, went over the railing at the top, and immediately got back onto the ladder to come down. *Id.* Scott said Dooley appeared "shaky". *Id.* Scott said that after Dooley fell, he took the hood off his head and did not shut off the air bottle. *Id.* Scott stated he merely took the hood from Dooley's face and did not concern himself with whether air was coming out. *Id.* Scott stated that about a minute had elapsed between the time Dooley ascended the ladder and the accident. *Id.*

The memorandum summarizing Chevron's investigation of the incident provided the following information:

> We have completed an investigation of the April 19 accident that resulted in the death of Bruce Dooley. The following are the pertinent facts and our conclusions of how the accident happened:
>
> * * *
>
> 3) The head operator, who was the backup for the job, had the following observations:

– Bruce put the plastic hood of the ELSA over his head.

– He believes Bruce opened the air valve on the ELSA.

– Bruce went up the ladder on the scaffolding and climbed over the top rail.

– After approximately 5-10 seconds on the platform, he climbed back onto the ladder.

– He fell to the ground after descending only one or two rungs of the ladder.

– As Bruce began his descent, he appeared to be shaky moments before he fell.

* * *

6) After the ambulance left the scene the air valve on the ELSA pack was found closed with the supply pressure indicator in the full (green) zone of the dial.

7) The head operator and all of the emergency responders have indicated that they did not close the air valve after the fall.

8) Shortly after the incident, the air valve was opened and air flowed into the plastic bag.

* * *

10) The air in the ELSA air-pack was analyzed by the refinery laboratory and found to meet all specifications for Grade D breathing air established by the Compressed Gas Association.

11) After completing the air analysis, this ELSA air-pack was recharged to full air pressure. The air pressure gauge indicator was in the same full position to that found after the accident.

* * *

On the basis of the facts and evidence, it is reasonable to conclude that Bruce fell from the ladder because he lost consciousness due to asphyxiation. We believe that either he never opened the air valve at all or he cracked open the valve and then closed the air valve while on the ladder or platform. In both of these situations, Bruce would not have been getting enough oxygen. Our tests show that if the ELSA plastic bag is worn over the head with the air valve closed, the oxygen percentage within the plastic bag drops rapidly.

One possibility is that Bruce never opened the valve. We do not believe that Bruce fully opened the valve before climbing the ladder. Our tests indicate that if the valve had been fully opened, a noticeable drop in the pressure gauge would have occurred in 20 seconds. It seems improbable that Bruce would have closed the valve within 20 seconds after opening it.

Another possibility is that Bruce only slightly cracked the valve open. He could have been trying to conserve air in order to extend the five minute capacity of the ELSA unit. The exertion of climbing the ladder could have created an oxygen deficiency. Then in his disoriented state, Bruce may have mistakenly closed the valve in an attempt to get more air.

It is unlikely that we will ever know for sure which theory is correct. However, under both theories, Bruce would not have been getting enough fresh air.

Id. Chevron Report.

In a report prepared by Robert A. Budinsky, Jr., a pharmacologist/toxicologist concluded that Dooley's death was not caused by exposure to hydrogen sulfide. (Pls.' Second Supp. Resp., Exh. B, p. 4.) He found the site of the exposure significant, in that most cases of exposure resulting in central nervous system impairment occur in enclosed spaces, which the Dooley accident site was not. *Id.* He also indicated that a loss of consciousness occurs in hydrogen sulfide exposure situation where the odor threshold is greatly exceeded. *Id.*, p. 7. No one in the vicinity of Dooley's accident report the characteristic odor of hydrogen sulfide, which is that of rotten eggs. *Id.*, p. 5, 7-8.

The plaintiffs' suit, brought under theories of strict liability, negligence, gross negligence and breach of express and/or implied warranties, and failure to warn contends that the ELSA was defective. Plaintiffs' engineering design expert, G. Fred Liebkemann, has formulated an opinion regarding the defect in the ELSA based on his examination of the product.

Plaintiffs indicated in their response to a document request that Liebkemann's report and documents provided through disclosure by ISI supplied the basis of the supporting information behind their lawsuit. (Defs.' Summ. J. Mot., Exh. B, Request & Answer No. 21.) Liebkemann, a mechanical engineer, stated that the design of the restrictor, hoseclamp and hose assembly is defective because the hose can crimp, thereby cutting off or substantially reducing the flow of air to the user. (Pls.' Supp. Summ. J. Resp., Liebkemann Aff.) He states that after reviewing photographs of the unit Dooley wore he determined that the hose crimped in "such a way that it

interrupted the flow of air to the hood worn by Mr. Dooley causing him to fall to his death." *Id.*, p. 2. Liebkemann inspected the ELSA pack actually worn by Dooley on June 19, 1991, at the Chevron facility. *Id.* Liebkemann Investigation Report, p. 1. Liebkemann also made the following observation:

> Experiments with the ELSA pack produced by Chevron at Lambert & Nelson on December 10, 1993 showed that in normal use and worn by a person the rubber hose between the regulator and the hood over the users head may have a bend of about 90 degrees forced in it as shown in attached photos A and C causing a restriction in the airflow to the hood. As shown in photos A and C the bend is to the rear of the user outside of his normal range of vision.
>
> The turning on of the air to the ELSA pack hood was observed and confirmed by a surviving witness. It appears that the closing of the air valve was done by Mr. Dooley himself. In the opinion of the undersigned that manipulation of the valve was done in an attempt to increase air flow as Mr. Dooley was breathing oxygen-deficient air, possibly containing H_2S because air flow from the regulator to the hood was being restricted as a result of the hose being crimped in a manner similar to that shown in attached photos A and C. Mr. Dooley was reported to be a very experienced and reliable employee. The only logical reason for such a person to manipulate the air valve after the physical exertion of climbing the ladder would be to attempt to increase air flow. It also appears logical that the combined effects of the valve being behind his body and oxygen deficiency due to the crimped

> hose could cause him to turn the valve clockwise instead of counter-clockwise in the attempt to get sufficient breathing air.
>
> Low pressure flexible hoses which are critical to life support and which are subject to being bent as shown in photos A and C should be equipped with a means to keep the hose's internal passageway from crimping, collapsing and restricting air flow. Hose manufacturers and companies utilizing hoses in products commonly utilize coiled spring wire, either inside the plies of the hose itself or internal or external to the hose in areas and restricting or shutting off flow. In the opinion of the undersigned the hose on the ELSA pack should have been protected against airflow restriction due to bending in the area within about 6 inches of the regulator outlet.

Id. Liebkemann Investigation Report, p. 2.

During his deposition, Liebkemann was questioned regarding his knowledge of certain facts, such as whether Dooley's supervisor had warned Dooley to use a Scott Air Pack, rather than the ELSA on the day of the incident. (Def.'s Supp. S.J. Mot., Liebkemann Depo., p. 146.) Liebkemann was asked whether he knew if Dooley was wearing a hard hat or safety glasses under the ELSA hood and stated he did not know. *Id.*, p. 147. He did not know if Dooley had anything in his hands when climbing the ladder or beginning his descent from the ladder. *Id.*, pp. 148-49, 178. He did not know that Chevron required a safety harness and lifeline assembly to be used when working in areas elevated by 10 feet or more. *Id.*, p. 176. Liebkemann was not aware of how Dooley had positioned the ELSA at any time of the incident. *Id.*, pp. 149,

156, 161-165. Liebkemann did not know whether Dooley hit the ladder during his fall. *Id.*, p. 165.

Liebkemann stated that he knew that Chevron personnel found the air valve on the ELSA closed soon after the accident, and the air gauge on the tank indicating a full green position. *Id.*, p. 167. He agreed that Chevron's testing of the air bottle worn by Dooley showed that seven minutes and twenty-two seconds of air remained. *Id.*

Liebkemann claims that the flow rate coming from the ELSA that Dooley wore at the time of the incident was less than the flow coming out of the other bottles tested by Chevron, and that was the reason for the timing of the air depletion. *Id.* He also stated that he was not aware of how many minutes/seconds of air the ELSA-5 was designed to hold, but of the units he tested the figures ranged from a minimum of six minutes and thirty-two seconds to a maximum of seven minutes and fifty-seven seconds. *Id.*, pp. 169-170. He testified that the Dooley bottle had the slowest flow rate of any of the bottles tested by Chevron in its investigation of the incident; however, he was not aware of whether the flow rate was within the design criteria for the ELSA-5. *Id.*, p. 170-71. Liebkemann also stated that he was not aware of any criticism of the design of the ELSA-5 unit by OSHA. *Id.*, p. 172.

Liebkemann also stated that the accident may have been caused because Dooley may have slipped from the ladder, stating "That's not what the witness (Jeff Scott) indicates, but I guess anything's possible." *Id.*, p. 179. When questioned further regarding the possible cause of

the incident, Liebkemann stated that it was possible that Dooley turned on the air prior to ascending the ladder and turned it back off when he actually began to climb the ladder. *Id.*, p. 183. Liebkemann described his opinion as follows:

> Examination – Isn't it probable that, if he did turn on the air to the ELSA hood before beginning his climb, isn't it probable that he turned it off before he began his climb, based upon the fact that the air gauge was in full green position and the air valve in the off position immediately after the accident?
>
> OBJECTION by Mr. Lambert
>
> Answer (by Liebkemann) – No. The only – in other words, Dooley was an experienced operator, and a refinery operator is familiar with turning valves off and on, and I don't think he would have turned it off, unless there would have been a reason, and the only reason I can think of is the restricted air flow coming to him. And, of course, the hose crimped over this little restrictor nipple or needle or whatever it is sticking out there would restrict the air flow, so that the flow that Chevron got in their tests on the bottle without the restriction would not be repetitive of the crimped hose restricted in the air flow.
>
> So, it is my belief that, at some point in time, Dooley realized that he needed more air, and I think he probably, in an effort to get – he had already turned it on and he couldn't turn it anymore in that direction, so he turned it the other direction and, in essence, turned it off, quite possibly, while he was disoriented from oxygen deficiency up at the top.

Q. At what point did Bruce Dooley, if he did try to operate the valve after he turned the air on, if he turned the air on? [sic]

A. I can't tell you at what point.

Q. How many minutes was Bruce Dooley on the ladder and on the platform before he began his descent? In other words, how many minutes elapsed from the time that, as you say, Jeff Scott heard some air flowing from the ELSA until the time that the fall occurred?

A. Jeff Scott's estimate was one minute or less, or slightly less.

Id., pp. 183-185.

On further inquiry regarding his opinion about the design of the ELSA, Liebkemann provided the following testimony:

Q. – By Mr. Lambert – And, in your opinion Mr. Liebkemann, having viewed this particular bottle which was in use by Mr. Dooley at the time of his death, in your opinion, is this bottle defective because of the design of the attachment of the hose to the regulator?

Mr. Miller – Object to the form.

A. – By Mr. Liebkemann – Yes. I think that – Of course, the whole bottle – The bottle is not defective; the gauge is not defective. But I think, since the purpose of the entire thing is to deliver a breathing air supply to a person, and this particular feature here, the combination of the hose in contact with that restrictor fitting can prevent the whole thing from functioning, that there is no way to conclude from anything other

than that the whole thing is improper and defective.

Q. Mr. Liebkemann, assuming that Mr. Dooley was wearing the air pack with the strap over his head and shoulder as depicted in Exhibit No. 7, is it fair to say that the bottle may well have been in the configuration as shown in these photographs of Mr. Eaves with the bottle?

A. Sure.

Mr. Miller – I object to the form, and that's assuming facts not in evidence and pure speculation. I'm going to object to the form of the question.

* * *

Q. – By Mr. Lambert – Is your opinion, Mr. Liebkemann, that if the valve was, in fact, off at the time Mr. Dooley hit the pavement, that the only likely scenario is that it was turned off in a struggle to increase the flow of air?

Mr. Miller – Object to the form. It's calling for pure speculation. It's not based on any facts in evidence.

Mr. Lambert – It's based on all the facts, Counselor.

Mr. Miller – Object to the form as leading.

Mr. Lambert – Just go ahead.

A. Yes, I think the most likely reason for anyone exerting physical energy, like climbing a ladder, to attempt to adjust an air – a breathing air supply valve would be to attempt to increase the air supply, and I think he probably was trying to increase the air supply, possibly dizzy

due to oxygen deficiency because of a restricted air flow, and turned it in the wrong way.

* * *

Q. Mr. Liebkemann, assuming that the scaffolding is being climbed by Mr. Dooley, do you think that it's reasonable that he would have the air pack on his side, as opposed to in front of him?

Mr. Miller – Object to the form.

A. If I was climbing a ladder, I would have it on my side, around – away from where it wouldn't be clanking against the ladder rungs.

Q. And Mr. Liebkemann, you have read Mr. Scott's statement or an excerpt of it. This is page 1 of 2 here where it says – Matter of fact, you read it into the record – where it says there is a question about the air flow where he says he turned it on or he heard it on?

A. Yes. Mr. Scott indicates he heard the air come on when Bruce turned it on.

Q. This statement was apparently taken on 4/20/91, the day after the incident. See that?

A. Yes.

* * *

Q. Now Mr. Liebkemann, assuming that these statements are accurate, are they confirmation of the fact that the air pack was on, as you understood it to be?

Mr. Miller: Object to the form.

A. Yes. They confirm that it was turned on in the first place; they confirm that about a minute

of air should have been gone out of it, so that the needle would have been slightly out of the green; and they confirm that, since the needle was not out of the green while the unit was on, there had to have been something restricting the flow out of the unit.

Q. Now, Mr. Liebkemann, based on what you have reviewed and, particularly, the physical evidence with regard to the unit that's in front of you, in your opinion, to a reasonable degree of engineering certainty, is the defect of this ISI air pack what caused Mr. Dooley to fall, and ultimately, his death?

Mr. Miller – I object to that question as calling for pure speculation, calling upon an opinion based upon facts that aren't in evidence and are not available to anyone, and it's a leading question.

The Witness – In my opinion, that's the most likely cause, taking everything into account, that the guy obviously got shaky for some reason with this think over his head, fell off the ladder.

* * *

Q. What other types of emergency life support units have you looked at, other than the Lifeair unit that's before you and the various ELSA units you've discussed here today?

A. None other.

Q. Exhibit – I believe it's 14 is a photograph – two photographs taken from the videotape showing the needle on the air gauge on the ELSA in question in the green; is that right? Is that the one?

A. These photos are bad that it's hard to tell where it is, but I can tell you this: The needle on this unit right after the accident was right at the top of the green, near the top of the green, and you can see that clearly when you play that videotape.

Q. And you have also testified that the gauge was functioning properly, as far as you know?

A. As far as I know, the Chevron guy on the tape opened valve [sic] right there and noted verbally on the tape that the gauge started to drop off and then he closed the valve. So at least it was moving. And then the unit was subsequently subjected to flow time tests in Chevron's lab, where elapse time, according to gauge positions full three-quarters, one-half, a quarter, and empty, were recorded, and it seems like the gauges worked.

Q. When Mr. Lambert was asking you questions during the last few minutes, you testified that, in your opinion, that the reason why the gauge was still in the green area after the fall was that there were [sic] some restriction in the air flow from the air tank to the hood; is that correct?

A. Yes.

Q. Do you agree with me that, when the valve to the unit is in the full off position, that that creates a restriction to the air flow?

A. No doubt about it.

Id., pp. 229-33, 237-38, 243-45.

Jeff Scott stated that he was to perform the check of the flare line clamp with Dooley on the day of the incident. (Def.'s Supp. Summ. J. Mot.; Exh. B., Scott. Aff., p. 2.) Scott stated that Dooley was advised to use a Scott Air Pack during the test, but Dooley chose to use an ELSA. *Id.*, pp. 2-3. Scott stated that he heard a hissing sound just prior to Dooley's ascent of the ladder, but he did not know if the ELSA was in fact on or off when Dooley began his climb. *Id.*, p. 3. After Dooley fell, Scott took the plastic hood of the ELSA off of Dooley's head. *Id.* Scott did not recall hearing any air flowing from the unit at that time. *Id.*

Plaintiffs also contend that ISI issued a Technical Bulletin in January 1987 announcing the change in design of the hose and hose clamp on the ELSA-5. The hose clamp was changed from a "dog ear" clamp to a "ferrule" clamp, which plaintiffs maintain was changed solely to protect the stem needle of the restrictor in the reducer valve assembly from being obstructed by the hose and restricting air flow in the hose. (Pl.'s Supp. Evid., p. 2 and Exh. 1.) Plaintiffs maintain that the alleged defective hose assembly should have been recalled and/or a warning should have been issued that the existing assembly was defective. *Id.* Plaintiffs contend that the alteration establishes that ISI had knowledge of the defect in the original hose design, and that another design was feasible prior to Dooley's accident. *Id.* Liebkemann was not aware of any similar incident which had occurred in the use of an ELSA unit, either manufactured by ISI or any other manufacturer. (Defs.' Summ. J. Supp., Liebkemann Depo. p. 182.)

In testing performed by Bruce Hefner, the senior manufacturing engineer for ISI, on units of the same make and model as the ELSA worn by Dooley, the plaintiffs' theory of the accident was reenacted. (ISI's Summ. J. Mot., Exh. H. Hefner Report, p. 1.) Hefner was unable to cut off the air flow without forcing the hose at a 90° angle to the valve. *Id.* Hefner also found no evidence that the ELSA-5 worn by Dooley was defective after viewing video tape and pictures of the accident site. *Id.*, p. 2.

Darell Bevis also conducted certain tests of the ELSA (ISI's Summ. J. Mot., Exh. I.) Bevis, an industrial hygienist, provides services and products in respiratory protection. *Id.*, Bevis Curriculum Vitae. Bevis stated the following regarding information he reviewed in connection with this case:

> It was speculated in one of the documents that I reviewed, that a restriction of the airflow through the hose between the cylinder and the hood on the ELSA ESCBA worn by MR. Dooley may have occurred. When the ELSA ESCBA is properly worn by a user, it is impossible to restrict the airflow through the hose between the cylinder and the hood without *intentionally* applying a force to crimp or kink the hose.

ISI's Summ. J. Mot., Exh. 1, p. 2. (emphasis in original.)

Discussion

Recovery under strict liability requires proof that: "(1) the defendant placed a product on the market that was in a defective condition and unreasonably dangerous for it [sic] intended use; (2) the plaintiff was using the product in a manner that was reasonably foreseeable; and

(3) the defective condition was the proximate cause of the injury to the plaintiff." *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 176 (5th Cir. 1985). "Mere proof of damage following the use of a product is not sufficient to establish liability." *Cather v. Catheter Tech. Corp.*, 753 F. Supp. 634, 639 (S.D.Miss. 1991). Furthermore, the "proof of a defect in a products liability case must rise above speculation and recovery cannot be predicated on a presumption from the mere happening of an accident." *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89, 96 (D.Md. 1989).

The Court is of the opinion that the plaintiffs have failed to present proof of a connection between the alleged defect in the ELSA air pack and the incident. *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, (5th Cir. 1985). All the evidence presented to explain the alleged defect and the cause of the accident is in the form of speculatory evidence presented to the plaintiffs' expert in the form of theoretical questions. (*See*, i.e. Defs.' Supp. Summ. J., Liebkemann Depo. pp. 183, 232-238.) Although circumstantial evidence is acceptable to prove a case, and plaintiffs' contention that the unit was on after the accident, thus was on while Dooley wore the unit, is a valid use of logic, it still does not suffice in overcoming defendants' summary judgment motion. There is no evidence, except for plaintiffs' speculation, that Dooley did in fact inadvertently turn off the unit while ascending the ladder. Even if the Court accepted this explanation as what actually happened, the plaintiffs cannot connect the alleged decrease in the air flow to the cause of Dooley's fall and untimely demise. It is equally as probable that what caused Dooley's fall was Dooley's foot slipped from a ladder rung, causing him to loose [sic] his balance and

fall. The investigation conducted by Chevron also presented several "theories" on the cause of Dooley's death, and acknowledged that the cause of death might never be determined.

Plaintiffs cannot present evidence that Dooley did, in fact, turn the air flow off himself, in an effort to increase the air supply to his hood. Plaintiffs also cannot provide competent evidence establishing that a crimp was in the hose, or even any facts establishing how a crimp, if any, came to be in the hose, other than to speculate that perhaps Dooley inadvertently crimped the hose while reaching for the dial to increase the air flow. Therefore, plaintiffs' theory of the accident, remains just that; a theory, grounded only in speculation and conjecture and unsupported by concrete facts, which is not appropriate to overcome a motion for summary judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-79 (5th Cir. 1994). There appears to be a factual controversy regarding the cause of Dooley's death, but unfortunately, the plaintiffs cannot definitively connect ISI's product with Dooley's death, and therefore, cannot survive ISI's motion for summary judgment.

Conclusion

Pursuant to the foregoing, the Court finds that the defendant ISI is entitled to summary judgment on plaintiffs' claims against the defendant. This opinion renders all other pending motions in this cause moot, and the Clerk shall be directed to dismiss them. A final judgment in conformity with and incorporating by reference the

foregoing Memorandum Opinion and providing for each party to bear their/its own costs shall issue

DATED, this the 23rd day of February, A.D., 1995.

/s/ Walter J. Gex, III
UNITED STATES
DISTRICT JUDGE

Supreme Court, U. S.
FILED
AUG 22 1996
CLERK

(2)

No. 96-35

In The

Supreme Court of the United States

October Term, 1995

KATHY DOOLEY, Individually and as Administratrix of the Estate of Bruce Dooley, Deceased, and as Next Friend of Isaac Dooley and Dawn Dooley,

Petitioners,

v.

INTERNATIONAL SAFETY INSTRUMENTS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The parties are correctly named in the caption. Respondent International Safety Instruments, Inc., is a subsidiary of Precision Hydro-Testing, Inc. Respondent has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully opposes the petition for writ of certiorari. Although it is difficult to put a finger on what petitioners are trying to say, what they appear to be saying is not consistent with either state or federal law, or with the factual record of this case.

The judgment below, which awards summary judgment to the respondent on petitioners' products liability claim, is perfectly conventional and well within the standards of established law. The judgment is correct because petitioners can prove neither that the product malfunctioned nor proximate cause. Petitioners' convoluted argumentation about a supposed *Erie* problem is spurious because the federal and state standards for awarding summary judgment are virtually the same. Petitioners demonstrate no important question on this or any other issue. They also misstate Mississippi law regarding both products liability and opinion testimony.

STATEMENT OF THE CASE

This case involves an unexplained and ultimately unexplainable industrial accident. Petitioners' decedent, Bruce Dooley, lost his life when he fell down a ladder while attempting to inspect a flare line clamp at an oil refinery. What caused Dooley to fall will never be known with any degree of certainty. He may have lost his footing through inadvertence or fatigue. He may not have activated his air pack. He may have activated his air pack and then turned it off. The evidence is simply inadequate to rule out any of a number of possibilities.

Petitioners' effort to make a case against respondent thus required at least two wholly speculative steps. First, petitioners were required to speculate about the immediate cause of the fall. On this point, petitioners originally alleged that Dooley was poisoned by hydrogen sulfide gas. Since abandoning that theory, petitioners have claimed only that Dooley's fall was the result of a lack of air.

It is undisputed that Dooley was misusing an air pack sold by respondent at the time he was killed. Dooley was undisputedly using the air pack for a purpose for which it was not intended, and he was doing so in violation of specific instructions and warnings given by his supervisor. However, petitioners have theorized that any lack of air resulted not from Dooley's undeniable misuse of the air pack, but rather from a malfunction in the air pack.

The air pack targeted by petitioners' theory is an emergency-escape device called an ELSA-5, manufactured by respondent. The ELSA-5 provides a 5-minute supply of air to an unstructured, sack-like hood that is worn over the head. The ELSA-5 is designed to be donned quickly in emergencies to provide fresh air to the wearer while he or she escapes from an area that suddenly and unexpectedly has become hazardous.

The ELSA-5 is *not* designed or intended to be worn as a protective device by persons who are preparing to enter into areas of known or suspected hazard. Devices designed for that quite different purpose have a design that is significantly different from the design of the ELSA-5. Among other things, they are tightly fitting and

pressurized. One such device is the Scott Air Pack, the device that Dooley was instructed to wear during the operation that led to his death.

It is undisputed that Dooley was using an ELSA-5 improperly and against the instructions of his supervisor, Cemore "Buddy" Abney. The job required Dooley to climb a ladder to a platform near the flare line clamp and then use a device designed to detect hydrogen sulfide gas. At a safety meeting that morning, Abney instructed Dooley to use a Scott Air Pack for the job.

After the meeting, Dooley and Jeff Scott, who was assigned to assist Dooley, went to the control room and picked up an ELSA-5. Thereafter Abney specifically warned them that "the ELSA-5 was not suitable for the job and that a Scott Air Pack should be used instead" and specifically reminded them that the ELSA-5 "was to be used for emergency purposes only." Dooley used the ELSA-5 anyway.

Scott was the only eyewitness to the accident. According to Scott, Dooley donned the ELSA-5 and put the plastic hood over his head before climbing the ladder to check the flare line. Scott recalled hearing a hissing sound for a few seconds before Dooley began climbing the ladder, but he did not see Dooley open the air valve and did not know whether the unit was on or off when Dooley started up the ladder. He could not recall how Dooley was wearing the unit.

Wearing the ELSA-5, Dooley climbed the ladder to the platform to check the flare line. Dooley fell as he started to climb back down the ladder from the platform.

Scott reached Dooley first and removed the plastic hood of the ELSA-5 from Dooley's head. Scott did not recall hearing any air flowing from the unit at that time. Scott stated that he did not turn the unit off.

Thereafter, the ELSA-5 was found to be in the full "off" position and full of air. Subsequent tests showed the ELSA-5 to be working perfectly.

Petitioners assert that the ELSA-5 is defective because it is physically possible to cut off the flow of air to the hood by forcing an extreme bend in the air hose, the way one can intentionally and forcibly put a kink in a water hose to cut off the water. Contending that the air hose should have been impossible to force to a close, petitioners speculate, without any evidentiary or scientific basis, that Dooley unknowingly was wearing the ELSA-5 in a manner that caused such an extreme bend in the air hose. They speculate further that when Dooley recognized he was not getting enough air, he mistakenly turned the air off altogether.

Numerous legal problems with petitioners' expert's purported opinion to this effect were pointed out below. Among other things, it is clear that the expert endorsed the theory without inspecting or testing the ELSA-5 in question. In addition, the theory presupposes that it is physically possible to wear the ELSA-5 in a manner that could force the air hose into the necessary extreme bend, when the evidence suggests that even the most bizarre ways imaginable of wearing the device would not produce a bend sufficient to cut off the air flow. The theory presupposes further that Dooley was wearing the ELSA-5 in some such bizarre manner, when there is absolutely no

evidence that he was. Further still, petitioners' theory presupposes that Dooley could have turned off the air flow of the ELSA-5 without knowing that he had done so, when the evidence shows that, among other things, the activated air flow was plainly audible.

Furthermore, petitioners' speculative theory is simply impossible to reconcile with the undisputed fact that the ELSA-5, which was certified to hold only five minutes of air, was found to be fully charged after the accident, indicating it had never been turned on for more than a few seconds. The conclusion is unavoidable that Dooley was attempting to wear the ELSA-5 without activating it, in the apparent belief that he would have time to do so if he detected the presence of gas. Very possibly, Dooley was trying to avoid turning in a "used" ELSA-5, since in so doing he would have called attention to the fact that he had violated procedures and specific instructions about the safety equipment required for the job.

Thus even if it could be proved that lack of air caused Dooley to fall (this fact is also uncertain), the evidence in this record plainly could not establish petitioners' speculative defect as the cause of the presumed lack of air rather than Dooley's undeniable misuse of the product. Respondent was entitled to summary judgment under any conceivable theory of products law.

REASONS FOR DENYING THE WRIT

This case does not present a question worthy of review by this Court. The decision below is well within

the parameters of established law and perfectly reasonable in light of the evidence. Petitioners' assertions to the contrary depend on misstatements of law, of fact, or of both.

Petitioners' designated question, Petition at i, is less than clear, but in essence, it accuses the Fifth Circuit of applying a summary judgment standard that is more favorable to defendants than the standard applied by the Mississippi Supreme Court. This alleged procedural difference is said to have affected the outcome of this case to an extent that raises important federal concerns.

Petitioners' question is spurious because there is no conflict between the federal summary judgment standard and the Mississippi standard. Indeed, the two standards seem indistinguishable. In addition, petitioners' argument about a supposedly important conflict among the circuits shows no relevant conflict at all.

A. The Mississippi Standard for Granting Summary Judgment is Based on the Federal Standard and Is Indistinguishable From It.

Despite what petitioners imply, there is no material distinction between the summary judgment standards applied by the Fifth Circuit and the Mississippi Supreme Court. To the contrary, for practical purposes, Mississippi has adopted the federal rule.

The summary-judgment standard applied by Mississippi courts is established by the Mississippi Rules of Civil Procedure. Mississippi's rules, which were adopted by the Mississippi Supreme Court effective January 1,

1982, are based on the Federal Rules of Civil Procedure, and they track the federal rules almost word for word. There is no material difference between the two versions of Rule 56, which governs summary judgment.

Moreover, acknowledging the source of the rules and the goal of consistency, the Mississippi Supreme Court has repeatedly stated that federal interpretations of the federal rules should be regarded as persuasive in interpreting the Mississippi rules. "We have consistently and almost routinely said that . . . the federal construction of the counterpart rule will be 'persuasive of what our construction of our similarly worded rule ought to be.' " *Bruce v. Bruce*, 587 So.2d 898, 903 n.5 (Miss. 1991) (citing a list of examples, including Rule 56).

One of the earliest cases to interpret the Mississippi rules addressed summary judgment. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 364 n.1 (Miss. 1983). In *Brown*, the Mississippi Supreme Court effectively endorsed the federal standard:

> We observe here in relevant part the wording of our Rule 56 is identical to the wording of Rule 56 of the Federal Rules of Civil Procedure. Accordingly, we regard authoritative constructions of Federal Rule 56 as persuasive of what our construction ought to be.

The court has continued to cite this standard for summary judgment. *See, e.g., Strantz v. Pinion*, 652 So.2d 738, 742 (Miss. 1995) (citing *Brown*); *Page v. Wiggins*, 595 So.2d 1291, 1295 (Miss. 1992) ("In construing Miss.R.Civ.P. 56, it is appropriate for this Court to rely on federal law.").

Plainly there is no "direct collision" between the federal and state standard for granting summary judgment as petitioners contend. Petitioners obviously struggle to suggest the contrary. The convolutions of pages 10 through 13 and 20 through 26 of the Petition reflect the argument's lack of substance. Petitioners' assertion that the Fifth Circuit is "semaphoring" its supposedly improper standard is tellingly strange. Petition at 13.

No doubt, petitioners are unhappy with the judicial temperament of the judges of the Fifth Circuit, whose independence of mind is plainly not to petitioners' liking. But independence of mind is not error.

In sum, the writ should be denied because the question presented has no basis in law.

B. Despite Their Assertions, Petitioners Demonstrate Neither a Relevant Nor an Important Split of Authority.

Petitioners purport to show an important conflict among pertinent federal cases, but their citations of authority are either beside the point, or misstated, or both.

Petitioners rely principally on an attack on the Fifth Circuit's decision in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*). But *Shipman* predates by more than a decade Mississippi's adoption of its rules of civil procedure and Mississippi's subsequent express embrace of federal interpretations of the rules. Thus whatever else

Shipman may have done, it plainly could not have created, nor can it now represent, a divergence in the summary judgment procedures applied by the Fifth Circuit and the State of Mississippi. *Shipman* was not even a summary judgment case. It dealt instead with the standard of review for jury verdicts. *Shipman* was not relied upon, or even mentioned, in the opinions below.

Thus *Shipman* does not represent a "direct collision" between Mississippi law and federal law in any sense, let alone in the way petitioners suggest. Similarly, petitioners' reliance on *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749, 100 S.Ct. 1979, 64 L.Ed.2d 659 (1980), and similar cases, is completely beside the point.

The purported division among the courts of appeal to which petitioners point, Petition at 9 n.5, misses the mark for the same reason: whatever the division, it cannot matter here, where the state and federal standards are indistinguishable. Moreover, the conflict among the courts of appeal, if it exists at all, does not appear important. The authorities rather suggest substantial uniformity among both the courts and the commentators. *See, e.g., Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994); 9A Wright & Miller, *Federal Practice and Procedure* § 2525 (1995).

C. Much of Petitioners' Argument Appears Beyond the Scope of the Question Presented. The Points Made Are Not Worthy of a Writ In Any Event.

The remainder of petitioners' argument is so far removed from the apparent point of the question presented, Petition at i, that it ought to be disregarded, first, as a violation of this Court's Rule 14(1)(a). But the points are not worthy of a writ in any event.

1. Petitioners' extreme view of Mississippi products law is unfounded.

At pages 13 through 20, petitioners appear to argue that the lower courts either misunderstood or misapplied Mississippi products law. Even if it otherwise had some merit, the point would not be worthy of a writ. But petitioners' argument lacks legal merit altogether, because it misstates the law.

Petitioners assert that Mississippi adheres to an extreme view of *res ipsa loquitur*, or something analogous, in products liability cases and that their evidence should have been found sufficient for trial under that standard. But none of the cases petitioners cite would justify permitting a trial on the speculative evidence presented below.

For example, the *Daniels* case, on which petitioners primarily rely, Petition at 14, is easily distinguished from this case. *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993). In *Daniels*, the product, a new car battery, obviously malfunctioned: it exploded. Thereafter the battery was

unavailable for testing. The eyewitness testimony of the injured plaintiff was sufficient to eliminate explanations for the explosion other than a defect in the battery. *Id.*

The situation here is virtually the opposite of *Daniels*. Here the product was available for testing, and testing showed that the ELSA-5 was working perfectly. Thus petitioners must rely on speculation to suggest that the ELSA-5 malfunctioned at all, and they cannot rule out other, equally or more plausible explanations for the accident.

Daniels in no way substantiates petitioners' wild-eyed view of Mississippi products law. The truly radical sweep of petitioners' view becomes apparent at page 19 of the Petition, where petitioners argue, in effect, that Mississippi has shifted the burden of proof in products cases to the defendant. That petitioners offer no support for this proposition is understandable. The assertion goes far beyond anything the Mississippi Supreme Court has contemplated.

The writ should be denied with regard to any issue bearing on the particularities of Mississippi products law for the additional reason that the law applicable to this case is now no longer the law of Mississippi. In 1993, the Mississippi Legislature adopted a broad reformulation of products liability law as part of a tort reform measure. 1993 Miss. Laws ch. 302 § 1, *codified at* Miss. Code Ann. §§ 11-1-63 (Supp. 1995). The substantive aspects of the reform measure apply to cases filed on or after July 1, 1994. 1993 Miss. Laws ch. 302 § 5. The statute does not apply to this case. The cases on which petitioners rely all predate the statute. Thus petitioners are asking this Court

to waste its time on a Mississippi common-law scheme that is obsolete.

2. Petitioners' extreme view of Mississippi law regarding the admission of expert opinion is unfounded.

At Petition pages 26 and following, petitioners engage in an intemperate attack on the Fifth Circuit panel for supposedly failing to show proper deference to the opinion of petitioners' expert. Petitioners make no discernable effort to relate this diatribe to the question presented; the argument ought to be disregarded on that basis alone. Petitioners also make little or no effort to articulate a *legal* question; instead they primarily attack the integrity of the individual judges. That sort of thing obviously does not merit further consideration by this Court.

To the extent any legal point at all may be inferred from this aspect of petitioners' argument, the point misstates Mississippi law and is meritless. Thus, if petitioners mean to imply that Mississippi law imposes no limit whatsoever on what an expert may say and that *any* expert "opinion" on liability will therefore be sufficient to permit a jury verdict in Mississippi courts, they are simply wrong.

In Mississippi, as in federal law, the basic test for admissibility of opinion testimony is found in the rules of evidence. The Mississippi Rules of Evidence, adopted in 1986, are based on the Federal Rules of Evidence. The

rules on opinion testimony follow the corresponding federal rules almost verbatim. *Compare* Article VII, Miss.R.Evid., *with* Article VII, Fed.R.Evid.

Moreover, the Mississippi Supreme Court has plainly never stripped the trial courts of authority to exercise oversight of expert testimony, as petitioners appear to suggest. On the contrary, trial courts are instructed to exercise oversight and to ensure that proffered opinions meet the test of the rules. *See, e.g., Goforth v. City of Ridgeland*, 603 So.2d 323, 329 (Miss. 1992) ("before a qualified expert's opinion may be received, it must rise above mere speculation"); *Hart v. State*, 637 So.2d 1329, 1338-39 (Miss. 1994) ("the abolition of the ultimate issue rule does not result in the admission of all opinions").

In addition, Mississippi has consistently recognized that expert testimony based on an inadequate examination, or on assumed facts which are later disproved, must give way to proof based on actual observations or measurements. *Gulf Ins. Co. v. Provine*, 321 So. 2d 311, 315 (Miss. 1975); *Johnson v. Ferguson*, 435 So. 2d 1191, 1195-96 (Miss. 1983); *Russell v. Mississippi Cent. R.R. Co.*, 125 So. 2d 283, 285-86 (Miss. 1960).

Thus, there is plainly no mandate in Mississippi law that a trial court defer to an expert's conclusory "opinion" that a plaintiff has a claim. There is no reason to believe that the outcome of this case would have been different under the Mississippi Rules of Evidence.

3. The judgment below also rests on lack of proof of proximate cause.

The writ should be denied for the additional reason that the judgment below stands on the independent basis of lack of proximate cause. Proximate cause is an essential element of a products case. *Daniels*, 629 So.2d at 600. Mississippi applies conventional tests of proximate cause. *See, e.g., Holliday v. Pizza Inn, Inc.*, 659 So. 2d 860, 866 (Miss. 1995), *quoting Mississippi City Lines v. Bullock*, 194 Miss. 630, 13 So.2d 34, 36 (1943). Thus even if petitioners could show some specially favorable Mississippi products liability law, respondent would still be entitled to judgment on lack of proximate cause.

CONCLUSION

The writ of certiorari should be denied.

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No. 96-35

In The

Supreme Court of the United States

October Term, 1995

KATHY DOOLEY, Individually and as Administratrix of the Estate of Bruce Dooley, Deceased, and as Next Friend of Isaac Dooley and Dawn Dooley,

Petitioners,

v.

INTERNATIONAL SAFETY INSTRUMENTS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY

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RESPONSE TO FACT STATEMENT

For the Court's convenience, the Petitioner will be referred to as "Mrs. Dooley" and the Respondent as "ISI." ISI begins with the statement that "[t]his case involves an unexplained and ultimately unexplainable industrial accident." ISI's brief at 1. ISI's fact statement concludes with the forceful asseveration "[t]he conclusion is unavoidable that Dooley was attempting to wear the ELSA-5 without activating it, in the apparent belief that he would have time to do so if he detected the presence of gas." ISI's brief at 5. Between these two contradictory statements facts get lost.

This case involves an approximately twenty-five foot fall causing the death of a refinery worker, Bruce Dooley, while he was using ISI's respirator. ISI posits that Mrs. Dooley's case requires two "speculative steps." Respondent's brief at 2. First, ISI insists, the proof of the "immediate cause of the fall" is not susceptible of reliable proof sufficient to create a *prima facie* case. ISI's brief at 2.

In explaining how this is so, ISI makes much of the "undisputed misuse" of the ELSA-5 breathing apparatus at the time of Dooley's death. ISI's brief at 2. How this reflects on the alleged failure of proof is not stated. However, Mrs. Dooley has never conceded that Bruce was misusing the apparatus. What is undisputed is that his supervisor, Mr. Cemore "Buddy" Abney, thought the ELSA a "piece of junk" (R. 498, 1472), and told Bruce to use a different respirator.

The logical connection ISI oddly fails to make is that a "misuse defense" necessarily assumes that the plaintiff

claims the product, as "misused," caused injuries. Without causation, there is no defense necessary. Mrs. Dooley alleges that her husband died because of ISI's failure to design a protected airway from the compressed-air tank to the mask. Mrs. Dooley does not claim that he died from entering an atmosphere where the ELSA failed as a protective device.

ISI asserts that Mr. Jeff Scott, Dooley's "buddy" on the job, "did not see Dooley open the air valve and did not know whether the unit was on or off when Dooley started up the ladder." ISI's brief at 3. In a tape-recorded interview with Chevron officials immediately following the accident, Jeff Scott unequivocally stated that he saw Dooley turn on the device. (R. 503, 1474) Because of the procedural posture of the case, any contradictory statement made by Scott later must be regarded as merely a disputed fact for presentation to the jury. The post-accident interview also makes clear that Scott never saw Dooley turn off the unit.

ISI's factual rehearsal implies that Dooley performed his job and started back down the ladder. ISI's brief at 3. In fact, what first alerted Jeff Scott that something was wrong was Dooley's premature reappearance atop the ladder. (R. 1475) Based on Scott's interview just after the accident, a reasonable inference from the fact that Bruce only spent a few seconds atop the scaffolding and then became rubbery-legged attempting to descend the ladder is that he either had been poisoned or his only source of fresh air was not working.

Mrs. Dooley's second improper "speculative step" appears to be the chain of reasoning connecting Dooley's

fall with the ELSA. ISI is understandably not eager to report that its own expert opined that Dooley fell because he had become hypoxic. (R. 304) This opinion was based on several facts: 1) the eyewitness reports that Dooley fell leadenly after his first few wobbly steps; 2) the post-mortem examination's failure to reveal another physical cause; and 3) Chevron's own tests which showed that when the air bag is worn with the air off, the oxygen percentage in the bag drops rapidly.

Because air flowed from the device in tests conducted by Chevron immediately after the accident and later, all of which were videotaped and available to the parties, Mrs. Dooley's expert mechanical engineer, Fred Liebkeman, believed that a hypoxic condition could only result from the hose constricting the flow. Liebkeman of course assumed that Scott was accurately reporting that Dooley turned on the device. ISI avers in its brief at 4 that Liebkeman's opinion was somehow impeached or unreliable because he neither inspected nor tested the ELSA-5. This statement is a canard. Liebkeman had available to him both exemplar units as well as the actual unit worn by Dooley. (R. 203, 1621) He also had available Chevron's testing via videotape, the transcript of Jeff Scott's interview, and other Chevron reports, including its final report which also concluded that Dooley fell after becoming hypoxic.

ISI also says that Mrs. Dooley "speculate(s) further that when Dooley recognized he was not getting enough air, he mistakenly turned the air off altogether." ISI's brief at 4. After the accident, the ELSA Dooley wore was found turned off. Mrs. Dooley's expert, Fred Liebkeman, believed wholly absurd the notion that an experienced

(17 years) refinery worker would ascend thirty feet expecting to stay some minutes on a platform with his respirator turned off. (R. 1619) Hence, Liebkeman said that if Dooley had turned off the unit, it could only have been while on the platform, out of Jeff Scott's line of sight. The point, which should not be lost, is that the time between the earliest point Dooley could have turned the ELSA off and the point he became groggy was too short for Dooley's purported action to have caused his condition. If Dooley turned off the unit, Liebkeman opined that he would have done so attempting to restore the airflow. (R. 1611-14)

ISI asserts Mrs. Dooley's theory that the hose crimped against the air flow restrictor is "impossible to reconcile with the undisputed fact that the ELSA-5 was found to be fully charged after the accident, indicating it had never been turned on for more than a few seconds." ISI's brief at 5. Since Dooley was on the scaffolding only a very short time, Mrs. Dooley's theory of the air flow being constricted is entirely consistent with the ELSA's containing most of its air. The point, of course, is that based on the facts and the procedural posture of the case, this determination is for the jury.

RESPONSE TO LEGAL DISCUSSION

ISI argues that because Mississippi's summary judgment rule is substantially identical to, and modelled upon, the federal rule, then the standard for determining whether a jury question has been made out must be the same. ISI's brief at 6-8. ISI does not bother to explain the

reasoning behind its conclusion. Neither Mississippi's Rule 56 nor the federal rule say anything about the sufficiency of evidence to present a jury question, which is the issue here.

In ISI's discussion of the Fifth Circuit's *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), it avers that Mrs. Dooley's discussion of that case's effective overruling of *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), is irrelevant to this case. The reasons appear to be two; the first is since Mississippi's rule and the federal rule are construed substantially identically, "whatever else *Shipman* may have done, it plainly could not have created, nor can it now represent a divergence in the (state and federal) summary judgment procedures." ISI's brief at 8-9. The fact remains that *Shipman* was designed to announce a standard for sending cases to juries which was a higher standard than that announced in *Lavender*.

The second reason advanced by ISI for *Shipman*'s irrelevance to our discussion is that it "dealt . . . with the standard of review for jury verdicts." ISI's brief at 9. This is not quite accurate: *Shipman* stated a standard for the judge to use in deciding whether sufficient evidence had been presented to submit a case to the jury. ISI also is unaware that a sufficiency determination for directed verdicts mirrors that of Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

As discussed in Mrs. Dooley's Petition, implicit in deciding *Lavender*'s status is the question of whether a state's treatment of inferential evidence is substantive and therefore must be accorded the status of a decisional

rule. That determination involves taking into account areas of law, such as antitrust, which treat inferential evidence as being bound up with the substantive rules governing the body of law.

In this case, Mrs. Dooley reasons that Mississippi treats circumstantial evidence in appropriate products liability cases as analogous to the treatment of circumstantial evidence in cases where *res ipsa loquitur* is applied. This analysis assumes Mrs. Dooley is correct, based on the procedural posture of the case, that she has made out a case which shows that her husband did no more than use the device in a foreseeable manner. There is no credible evidence indicating that Dooley did anything but turn the unit on, climb twenty-five feet, and shortly lose control of his faculties. There is no evidence that the air-tank was contaminated; there is no evidence that other toxins were present; there is no evidence that Bruce suffered some physical ailment which caused him to pass out. Mrs. Dooley has effectively eliminated other causes of her husband's fall than some malfunction of the device providing his only source of air.

Under Mississippi law, the burden of production shifts to ISI to come forward with credible evidence showing some other cause. ISI refers to this as "an extreme view of *res ipsa loquitur*." ISI's brief at 10. Certainly, ISI's opinion has the good company of Justice Walker's dissent in *Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves*, 486 So.2d 374 (Miss. 1986). Walker veritably howled his disagreement with recognizing *res ipsa* burden-shifting principles in products liability law. *Id.* at 388-91. Nonetheless, Walker's three-judge dissent does not speak with the voice of the State.

ISI says, in its discussion of *Daniels v. GNB, Inc.*, 629 So.2d 595 (Miss. 1993), that "the product (in the *Daniels* case), a new car battery, obviously malfunctioned: it exploded. . . . The eyewitness testimony of the injured plaintiff was sufficient to eliminate explanations for the explosion other than a defect in the battery." ISI's brief at 10-11. Aside from the novelty of insurance defense counsel saying that a battery explosion is necessarily a malfunction caused by product defect, these statements are inaccurate. *Daniels*, like this case, was up on summary judgment. The Supreme Court of Mississippi made no such factual findings. Rather, the Court shifted to GNB the burden of producing evidence showing some other cause. *Id.* at 603.

GNB theorized that because Daniels had "hopped-up" the engine and rebuilt the starter and alternator that the battery became "overcharged" and exploded. The Supreme Court of Mississippi said – and this is *all* that it said – the parties' evidence created a genuine issue of material fact on causation for the jury to resolve. *Id.* at 603.

ISI claims Mrs. Dooley argues that Mississippi law shifts the burden of proof. ISI's brief at 11. This statement is false. Mrs. Dooley merely recites Mississippi law which shifts burdens of production in cases turning on circumstantial evidence where the plaintiff's evidence makes out a *prima facie* case. Mrs. Dooley's petition at 13-19.

ISI also faults Mrs. Dooley for failing to discuss law not applicable to this case. ISI's brief at 11. ISI is correct

that Mississippi's legislature has enacted a products liability statute, not applicable to this case, designed to freeze some aspects of Mississippi's common law. Miss. Code Ann. § 11-1-63 (Supp. 1996). ISI makes no effort to discuss how this statute affects this case. This writer's opinion, which is all that may be offered since the Supreme Court of Mississippi has not yet applied the statute, is that it reinstitutes assumption of risk as a complete defense, Miss. Code Ann. § 11-1-63(d). And in warning cases, the statute reestablishes a complete "open and obvious" defense. Miss. Code Ann. § 11-1-63(e).

The new law also appears to reverse Mississippi's adoption of the "risk-utility" analysis for product defects in favor of the "consumer expectations" analysis. Miss. Code Ann. §§ 11-1-63(b), (c)(i) and (c)(ii). However, in design defect cases, like this one, the new statute imposes a risk-utility analysis:

> The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

Miss. Code Ann. § 11-1-63(f)(ii).

Consequently, far from being "obsolete," ISI's brief at 12, the cases developed under Mississippi's design defect law remain good law. There is no reason to believe that Mississippi law in circumstantial evidence cases will not remain the law since evidence rules are not addressed by the new statute. However, the point of a petition to this

Court is to bring to the Court's attention cases where rules of law are involved which meet an "importance" requirement, usually of federal stature.

Thus, this case is not concerned with the elements, statutory or common law, which one must prove in order to recover. Rather, the case considers whether rules governing circumstantial evidence, under the proper legal elements, are of a nature to bind a federal court under *Erie*. ISI misses the point when it suggests that the Court would be "wast(ing) its time" on Mississippi products liability law. ISI's brief at 12.

ISI contends that Mrs. Dooley is "unhappy with the judicial temperament of the judges of the Fifth Circuit, whose independence of mind is plainly not to petitioners' liking." ISI's brief at 8. Mrs. Dooley is in good company: Judges Clark, King, Reavley, Johnson, and Wiener were also displeased with the judicial temperament of the *per curiam* in *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991), *cert. den.* 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992). This case has parallel features: if *Erie*'s federalism still means anything, it means that federal judges have no "independence of mind" where the fundamental policy of a state is at issue.

Products liability cases have become lightning rods; this is a good thing because it focusses attention on policy choices. The example given in Mrs. Dooley's Petition is telling: Learned Hand and Charles Clark believed that the policy choices underlying *International News Service v. Associated Press*, 248 U.S. 215 (1918), could not survive the economic realities of the Great Depression. Consequently,

to use Judge Clark's words, the Second Circuit "conquered the News case" *sub silentio* time and again.

Whether this Court – or any other – chooses to deal with economic policy issues publicly or as part of the Court's secret deliberations, the question still remains whether, in a federal system of coeval sovereigns, with a national sovereign of limited power, the federal courts should be making those choices. Mrs. Dooley respectfully suggests that carefully guarding the interdependent operation of the governments of the United States is a more important policy than whether a particular company or its insurers should be subject to the risk of an unfavorable jury verdict.

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